# DCPI 1844/2020

[2022] HKDC 747

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 1844 OF 2020

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BETWEEN

BIN-YAMIN Plaintiff

and

CHUEN HO CONSTRUCTION &

ENGINEERING COMPANY 1st Defendant

PUI HING CONSTRUCTION

COMPANY LIMITED 2nd Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Trial: 11, 12 & 16 May 2022

Date of Judgment: 21 July 2022

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JUDGMENT

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1. *INTRODUCTION*
2. This is a personal injury (“PI”) claim brought by the plaintiff arising from an industrial accident occurred in the course of his employment at a construction site.
3. *BACKGROUND*

*B.1. The Accident*

1. The plaintiff was injured in an accident on 4 October 2018 while he was working as a general labourer for the 1st defendant at a construction site by the roadside at A Kung Ngam, Chai Wan, Hong Kong (“the Site”). The 2nd defendant was the principal contractor of the Site while the 1st defendant was the 2nd defendant’s sub-contractor at the Site.
2. The plaintiff was first employed by the 1st defendant, the sole proprietor of which is one Mr Chan Chun Chuen (陳振銓) (“the 1st defendant”), DW1 in this case, as a general labourer in 2011. He worked at various construction sites which the 1st defendant had been engaged in. The Site at which the accident occurred was a street pavement where 2 trenches close to each other had been excavated for the purpose of laying gas pipes.[[1]](#footnote-1)
3. The plaintiff’s duties at the Site included manual digging, lifting heavy objects such as pipes, construction materials include cement, sand, mixing, fitting metal plates in trench walls, installing equipment, backfilling trenches, climbing up and down ladders and general duties. The 1st defendant allegedly spent his days visiting various sites and supervised his workers. He would communicate his instructions to the plaintiff in simple Cantonese which the plaintiff could understand. The plaintiff says he was the strongest worker amongst the 1st defendant’s employees and was usually assigned the heaviest duties, which is not disputed by the defendants.
4. On the day of the accident, while the plaintiff was transporting some bags of cement, sand and mud on a wheelbarrow by pushing them from the lower part to the upper part of the Site, he sustained injuries to his back (“the Accident”).

*B.2. The plaintiff’s case*

1. According to the plaintiff’s case, on the day of the Accident, he attended the Site where the defendants were carrying out some gas pipe replacement works. The plaintiff was instructed to transport some bags which were filled with cement, sand and mud from the lower trench area to the upper trench area on a wheelbarrow provided by the 1st defendant. The lower area was next to the traffic light controlled pedestrian crossing, while the upper area was slightly further up the hill on the same side of the pavement. Some blue colour railings (made of plastic) had been used to fence off the excavated areas / trenches. Sturdy rectangular plastic boards / plates with slightly raised edges at each of the narrower end were used to cover the holes caused by the excavations (“the Plates”). The two areas had been identified by the 1st defendant in the photo which can be found on [A-1/149]. This is not disputed by the plaintiff.

1. The plaintiff estimates that the distance which he had to transport the bags of cement, sand and mud was about 15 to 20 metres uphill, while the 1st defendant said the distance was about 10-odd steps and slightly uphill. The plaintiff claims that he had asked the 1st defendant for the truck-mounted crane or motorized wheelbarrow to perform the task, but the 1st defendant denied having received such a request from the plaintiff.
2. In his witness statement dated 28 January 2020 (“P’s WS”) and his supplemental witness statement dated 21 June 2021 (“P’s Supp WS”), the contents of which have been adopted as part of his evidence-in-chief, the plaintiff states the 1st defendant left the Site after giving instructions to him to take the bags filled with cement, sand and mud from the lower area to the upper area. With the help of a co-worker, the plaintiff lifted and stacked 1 bag of cement (weighing about 45 kg) and 4 bags of sand and mud (each weighing about 15 kg to 18 kg) on a wheelbarrow. Hence, the total weight placed over the wheelbarrow was estimated by the plaintiff at between 110 kg and 120 kg. Prior to the plaintiff placing them on the wheelbarrow, those bags had already been packed, tied up and placed outside the trench by the side of the pavement. After placing the 5 heavy bags of construction materials on the wheelbarrow, the plaintiff pushed it towards the upper part of the excavated area in order to deliver the materials to the other workers. While pushing the laden wheelbarrow over the edge of one of the Plates (estimated to be about 1 inch above the ground level), he felt a strong jerk and a sharp shooting pain in his back. According to the plaintiff, the Accident happened at around 2:15 pm.
3. Immediately after the Accident, the plaintiff left the Site and attended Dr Tuet On Sang (“Dr Tuet”)’s clinic in the same afternoon nearby. He complained to Dr Tuet that he had suffered from an *“accidental back sprain after lifting heavy objects”*. Physical examination revealed lower back muscle spasms and tenderness. He was given painkillers, muscle relaxants, intramuscular injection for pain relief and sick leave. From 8 October 2018 onwards, the plaintiff attended various clinics (mainly in the public sector) and was given sick leave for about 12 months until 25 September 2019. He also attended occupational therapy and physiotherapy treatments.

*B.3. The defendants’ case*

1. The defendants agree that the plaintiff was employed by the 1st defendant as a general labourer to work at the Site at $950 per day on the day of the Accident.
2. The 1st defendant alleges that he had given specific instructions to the plaintiff and other workers not to transport too heavy loads at any one time, otherwise the wheelbarrow would easily topple. Also when in need, they should seek assistance from other workers.
3. The 1st defendant further claims that, on the day of the Accident, the plaintiff attended the Site and worked for the 1st defendant as usual. The 1st defendant did not receive any report of injury or accident from the plaintiff on that day.
4. From the WhatsApp voice message records kept and disclosed by the 1st defendant, the plaintiff informed the 1st defendant on 5 October 2018 via a voice message that he could not attend work. According to the 1st defendant, he did not attend work from 5 to 13 October 2018 but worked on 14 and 15 October 2018. He did not work for the 1st defendant thereafter. WhatsApp transcripts[[2]](#footnote-2) produced by the 1st defendant show that the plaintiff had sent a voice message to him at 6:57 am on 5 October 2018, ie the day after the Accident, saying that he could not attend work on that day, but without giving any specific reason nor had specifically mentioned about the Accident.
5. According to the defendants, by this time, the plaintiff had been given 3 days of sick leave from 5 to 7 October 2018 by Dr Tuet from ‘Anson Care Medical Centre’. However, according to the 1st defendant, he was not informed about the sick leave. After the plaintiff had left the voice message, the plaintiff did not turn up to work on that day.
6. The 1st defendant then sent voice messages on WhatsApp to the plaintiff on 8 October 2018 at 9:10 am and 9:17 am, repeatedly complained to the plaintiff of why he was absent from work without informing him at all. Nothing was mentioned about the Accident.
7. Then on 12 October 2018, the 1st defendant was able to speak to the plaintiff on the phone when he was informed by the plaintiff that he had back pain. However, he was not told about the Accident.
8. On 13 October 2018 at 7:19 am, the 1st defendant sent a voice message to the plaintiff and asked him to work for “traffic control” duties at Nam Long Shan Road.
9. According to the 1st defendant, the plaintiff only resumed work on 14 and 15 October 2018 to do “traffic control” duties. He did not return to work for the 1st defendant after those dates.
10. This is in sharp contrast to the plaintiff’s allegation contained in P’s Supp WS that he was simply asked to attend the Site to meet the safety officer and not to work on those 2 days, which is something that the 1st defendant denies.
11. When it came to the time for the 1st defendant to pay the wages of the plaintiff for the month of October 2018, instead of paying him for 6 days of work, the 1st defendant paid the plaintiff a total of 13 days at HK$12,350 by cheque on or around 8 November 2018. The 1st defendant claims that it was done out of goodwill.
12. The 1st defendant also admits that he had given HK$500 to the plaintiff on the day of the Accident. However, he claims that it was money he lent to the plaintiff and not due to any work injury. He claims that the plaintiff would often borrow money from him and he was always willing to lend to him.
13. The 1st defendant further claims that the plaintiff had never submitted any sick leave certificates to him during the first few weeks after the Accident and therefore both him and the 2nd defendant were not aware of the Accident until after the plaintiff reported the matter to the Labour Department in mid-November 2018.
14. *DISCUSSION*

*C.1. LIABILITY*

1. Both the issues of liability and quantum are in dispute in this case.
2. At the outset of the trial, Mr Law for the defendants has very fairly indicated to the court that the defendants do not dispute that they are partly liable for the Accident, it is the degree of contributory negligence on the part of the plaintiff that they are contending with.

*C.1.1. The plaintiff’s allegations on liability*

1. Mr Wright for the plaintiff in his written opening submissions states that the cause of the Accident was due to the plaintiff “lifting up, pushing and balancing a very overloaded, wheelbarrow”. According to the plaintiff, despite the plaintiff’s strong build and ability to do heavy work, such a weight, probably well over 100 kgs, poses an obvious risk of injury. The wheelbarrow has one wheel and two handles which extend to the rear of the barrow. The worker has to lift the rear of the barrow by the handles and push the remainder on the single wheel, keeping one’s balance and preventing the barrow from falling sideways and spilling the load. This alone would require considerable strength and exertion.
2. The plaintiff claims that “under normal circumstances a mechanical device could and should have been used”; alternatively, the wheelbarrow should have loaded with far less materials to enable it to be pushed without risk of over excessive strain of the workers.
3. The plaintiff says the Accident could have been avoided if the 1st defendant had agreed to use a crane vehicle or a motorized wheelbarrow, an example of which can be seen from Photo “BY6”[[3]](#footnote-3) produced by the plaintiff, to transport the materials. It is alleged that this is being commonly used to transport heavy objects over a distance on construction sites.
4. Hence, the plaintiff claims that, under normal circumstances, a mechanical device could and should have been used.
5. The plaintiff says the 1st defendant caused him to grossly overload and push the wheelbarrow uphill and over the lip / edge of a raised trench cover.

*C.2 Factual issues to be determined*

1. The defendants accept that the plaintiff had met with an accident while at work on 4 October 2018. They also accept that they are partly responsible for the Accident. They only seek to establish contributory negligence against the plaintiff on the issue of liability.
2. On this matter, it falls on this court to make findings on the following factual disputes before determining whether the defendants should bear primary liability for the Accident. If so, whether the plaintiff should be partly responsible in contributory negligence. And what is the appropriate level of contributory negligence on the part of the plaintiff, if any.
3. In my view, the factual issues which the court needs to make findings on in order to determine the issue of liability will include the following:-
   1. What instructions were given by the 1st defendant to the plaintiff on the date of the Accident, if any;
   2. Whether the 1st defendant was present at the Site when the Accident happened;
   3. The distance which the plaintiff had to transport the bags of cement, mud and sand to the upper part of the Site;
   4. Whether the plaintiff was instructed to transport the bags of cement, sand and mud in one go or he was given the choice of dividing them in 2 (or more) journeys;
   5. Whether the truck mounted crane or a motorized wheelbarrow was requested for or necessary;
   6. Whether the 1st defendant was informed of the Accident on the day when it happened; if not, when did he first find out about the Accident;
   7. Whether the 1st defendant lent the plaintiff HK$500 on the date of the Accident without knowing that it was related to the work injury;
   8. Whether the 1st defendant had overpaid the plaintiff in wages (13 days instead of 6 days) for the month of October 2018; and
   9. Whether the plaintiff turned up to work on “traffic light” duties on 14 and 15 October 2018 or merely turned up to meet the safety officer at the Site on those days;

*C.2.1 General observations on credibility*

1. I have had the opportunity to listen to the evidence given by both the plaintiff and the 1st defendant in court and observed their demeanor when they gave their evidence. I must say that I was very impressed by the 1st defendant. He came across to me as a very sincere person and an employer who genuinely cared about the welfare of his workers, including the plaintiff in this case. He described the plaintiff as a “good and reliable worker” whom he had treated “like a brother”. He said that he was always willing to lend money to the plaintiff and helped him whenever he asked. He knew that the plaintiff was very poor and did not have a lot of money. When the 1st defendant was describing this to the court, he got rather emotional about it. I find it was a genuine and spontaneous response which was not feigned at all.
2. The 1st defendant also gave his evidence in a straightforward and direct manner. I find him to be an honest and credible witness whose evidence I prefer.
3. On the other hand, I find the plaintiff is a much more guarded witness who was more reserved and circumspect when giving his evidence. I do not think he was completely frank with the court when he gave his evidence in relation to the events happened immediately after the Accident. It is clear that he has embellished some of the material matters about the Accident during his evidence which had never been mentioned in his witness statements nor could be found in the documents. I also do not find his allegations about the instructions given by the 1st defendant and the use of truck mounted crane or motorized wheelbarrow credible at all. The same applies in relation to his allegations of injuries and inability to return to his pre-accident employment which I shall discuss under the heading of quantum.
4. Of course, as in every case involving finding of facts, what is much more important than the witnesses’ demeanor in court is whether the substance of their evidence is corroborated by other objective and independent evidence; whether their evidence is consistent with the contemporaneous documents / photographs found to be in existence either prior to or immediately after the occurrence of the accident; and whether the evidence is inherently probable or improbable in light of the circumstances of the case.
5. I remind myself that those factors are far more important than the witnesses’ demeanor and appearance when giving evidence.

*C.3. Findings on different factual disputes in relation to the Accident*

1. As some of the factual issues are intertwined, I shall discuss them under the following sub-headings only.

*C.3.1. What instructions were given to the plaintiff by the 1st defendant*

1. In P’s WS, the plaintiff mentioned that “(A)fter the lunch break, (the 1st defendant) came to us and instructed me to take bags of cement, sand and mud to the upper area…”. It was not mentioned anywhere in P’s WS or in P’s Supp WS that he was requested by the 1st defendant to transport those bags “in one go”. It was only towards the end of his cross-examination that the plaintiff first mentioned that “Boss Chan said it earlier on to take it all in one go”. He added that he had no choice because “as workers what can we say to him.” I notice that this answer was given only after he had categorically ruled out this was the case only 2 questions earlier. He was asked by Mr Law for the defendants specifically whether his boss had said anything about “why must have these 5 bags of materials (transported) at one go”?” His answer was “No, he did not say anything like that.” When asked why this important matter was not mentioned anywhere in his witness statements, the plaintiff said that he could not write everything down in his statements. When asked if the materials were transported in 2 trips which would not affect the work as it would only use 5 more minutes (according to the plaintiff’s own estimate), the plaintiff’s answer is that he did not know whether it would or would not as “(the 1st defendant) asked me to take it so I did”. By this, I take it that what the plaintiff meant was the 1st defendant had asked him to take all the bags “in one single journey”.
2. I find the above answers in relation to the request from the 1st defendant to transport the bags “in one go” or “in one single journey” not credible and in fact highly improbable. Not only such important matter had never been mentioned in the 2 witness statements filed on behalf of the plaintiff in this case, in my view, it is highly improbable in the circumstances that the 1st defendant would have made such an unreasonable request when there was no need for him to do so.

1. The 1st defendant on the other hand stated that he had instructed the plaintiff and other workers to cover up the excavated trenches on the date of the Accident. He arranged the plaintiff and another worker to place the bags of cements, sand and mud onto the wheelbarrow. Then for the plaintiff to transport the bags filled with cements, sand and mud to the upper area. He then left the Site and went to another site after giving the plaintiff and his co-workers those instructions.
2. The 1st defendant mentioned in his evidence that he had specifically reminded the plaintiff and his co-workers not to transport too many bags of cement at one time, otherwise the trolley would lose its balance during the transportation[[4]](#footnote-4). They had also been specifically reminded that when transporting cement and sand, they could seek assistance from other workers if such need arises. However, it is not clear from his evidence whether such instructions were given on the day of the Accident or was given to the plaintiff earlier.

1. On this issue, I prefer and accept the evidence of the 1st defendant than that of the plaintiff.
2. It is clear that what the 1st defendant had requested the plaintiff to do was a very simple task. He was asked to transport the bags of cements, sand and mud, which had already been filled, tied up and placed by the road side, from one area to another. He was asked to transport them for a very short distance only. It is not disputed that those bags were very heavy and weighted approximately 110 kg to 120 kg. I see no good reason why the 1st defendant would instruct the plaintiff and his co-worker to transport that “in one go” or “all together” as the plaintiff insisted in his evidence for the following reasons.
3. First, it is not disputed or indisputable that the distance from the lower area to the upper area as shown by the photos is extremely short. I estimate that it would only take no more than a couple of minutes for a person to transport the materials from the lower part to the upper part on a wheelbarrow, including the time the plaintiff and his co-worker to upload them onto the wheelbarrow. I do not accept it would take as long as 4 to 5 minutes each round as estimated by the plaintiff. Judging from the photos of the Site, I find the distance between the 2 trenches could not have been more than 10 metres or 10 odd steps away from each other. In any event, it was a very short distance.
4. Given such short distance and the fact that the bags had already been individually filled and packed, there is simply no reason in my view why the 1st defendant would insist the plaintiff to transport them on the wheelbarrow in one single journey.
5. Second, it is not disputed that the plaintiff and his co-worker were not under any time pressure to complete the task they had been assigned to do. The plaintiff said that the Accident happened sometime after lunch at around 2:45 pm. The 1st defendant remembered that it was sometime early in the morning and well before lunch. The Form 2 stated it happened at 3:30 pm. In my view, it does not matter whether the Accident happened in the early morning or sometime after lunch. The important thing is it would be a long time before the workers would finish work for the day (according to the plaintiff’s case) or before lunch (according to the defendants’ case). In other words, there was absolutely no time pressure for the plaintiff to finish the simple task of transporting those bags for a short distance from the lower area to the upper area. I note in particular that there is no evidence coming from the plaintiff to suggest that there were other jobs assigned to him that afternoon which would place him under any time constraint or pressure. Hence, in my view, the plaintiff had had plenty of time to complete the simple task. As such, he could have easily divided the load into 2 if not 3 journeys.
6. Third and perhaps most importantly, as stated by the 1st defendant towards the end of his cross-examination, when he asked the plaintiff to transport the materials uphill, it was not the plaintiff’s first day at work. He had been working on construction sites for 10 odd years (including 7 years for the 1st defendant). He could easily make a judgement himself as to whether to convey 1 bag, 2 bags or 3 bags at the time. The 1st defendant confirmed that he had not set a time limit for the plaintiff to complete the task. The plaintiff was not in a hurry to get off work. He did ask 2 persons to convey the bag of cement which weighed 45 kg onto the wheelbarrow. However, he added 2 persons cannot push a wheelbarrow. He thought the workers would not be so stupid as to load the wheelbarrow too heavy to be pushed. Given the short distance, with no time pressure and there was a slight slope involved, the plaintiff could have easily loaded one bag at a time or at least divided the loads into 2 if not 3 journeys. He could make a judgement call on that matter by himself.

1. Based on the above, in summary, I find the plaintiff had been given the instructions by the 1st defendant to transport the bag of cement (weighing 45 kg) and 4 bags of sand and mud (each bag weighted about 15 to 18 kg) from the lower area to the upper area of the Site. I find the distance between the 2 excavated areas was at around 10 metres or 10 odd steps only. I further find the plaintiff had not been instructed by the 1st defendant to transport those bags of materials “in one go” or “in one single journey” as alleged. In this respect, I find the plaintiff as an experienced construction site worker would be given the freedom to decide how he would transport the bags of cement, sand and mud himself. I find the plaintiff was not under time constraint or pressure to complete the simple task. He could have easily divided the load into 2 or 3 journeys had he decided to do so as each journey would take no more than a couple of minutes only. Had he done that, each load that he needed to carry on the wheelbarrow would be at around 40 to 60 kg only. In my view, such weight would be well within a reasonable or acceptable level for an experienced general labourer on construction site to handle.

*C.3.2. Was the 1st defendant informed of the Accident on the day of the Accident?*

1. The plaintiff claims that he had reported the Accident to the 1st defendant on the same day soon after it happened. The message the next morning, ie on 5 October 2018 at 06:57, was simply to let him know that he would not be attending work because the 1st defendant already knew about the injury.[[5]](#footnote-5)
2. I do not find this assertion credible at all in light of the contents of the contemporaneous records in the form of the transcripts of the WhatsApp’s voice messages.
3. In my judgment, it is clear from the context of the messages sent by the 1st defendant subsequent to the plaintiff’s message on 5 October 2018 that he was not aware of the Accident at all.
4. First, the plaintiff’s message on 5 October 2018 did not mention anything about the Accident at all. He merely mentioned the fact that he would not be returning to work on that day. Second, the subsequent messages on 8 October at 09:10 and 09:17 sent to the plaintiff by the 1st defendant show that the 1st defendant was not aware of the Accident as he was asking the plaintiff why he did not turn up to work without even giving him a call. This is further reinforced by the message on 13 October 2018 at 07:19 when the 1st defendant asked if the plaintiff wanted to return (to work) he could go to Nam Long Shan Road for traffic light duties.

1. It was only in the next voice message on 22 October 2018 at 09:23 that the 1st defendant had asked about the plaintiff’s situation and whether he had recovered. The 1st defendant further mentioned that if the plaintiff did not work for such a long time, he was not able to treat that as a “work injury” and would regard the plaintiff of “taking a rest” only. He was asking the plaintiff to come back to “sit” by which I understand it to mean doing traffic light control duties only. Again, nothing was mentioned about the Accident at all.

1. In the last voice message on 24 October 2018 (without the time recorded), the 1st defendant was literally begging the plaintiff to contact him by phone as he had contacted him many times but without receiving any reply from the plaintiff. Again, nothing indicates in that message that he was aware of the Accident.
2. Judging from the above contemporaneous records, I find the plaintiff had not informed the 1st defendant about the Accident on the day when it happened. Nor had he done so in the first few days or weeks following the Accident. I find it was only about 3 weeks later, ie on or about 22 October 2018, that the 1st defendant was first aware that the plaintiff was claiming “some form of injury” at work. However, I find it is clear from those voice message records that the 1st defendant had not been told by the plaintiff specifically of the Accident itself.
3. I further find the 1st defendant (and in turn the 2nd defendant) was only made aware of the Accident after the plaintiff made a report to the Labour Department on 15 November 2018[[6]](#footnote-6). This is consistent with the date of the 1st defendant first filed the Form 2 in relation to the Accident on 25 November 2018[[7]](#footnote-7) in which the 1st defendant stated that he did not know when the alleged accident happened. The Form 2 was subsequently revised by the 1st defendant on 28 November 2018 in which the 1st defendant stated that he could only describe the Accident “based on (the plaintiff’s) own report to the Labour Department”[[8]](#footnote-8). Hence, in my judgment, the contemporaneous documents strongly support the 1st defendant’s claim that he was not aware of the Accident until after the plaintiff had made a statement to the Labour Department on 15 November 2018. I so find that was the case.
4. As the 1st defendant explained during cross-examination, the principal contractor of the Site, namely, the 2nd defendant, had taken out insurance for his workers, including the plaintiff. Hence, the injury of the plaintiff actually would have “no impact” on him at all. In other words, he would not suffer any financial loss as a result. All he needed to do was to make the report. I accept that must be the case and there was no reason why the 1st defendant would not report the matter to the Labour Department had he been told by the plaintiff before 15 November 2018.

*C.3.3. Was the 1st defendant at the Site when the Accident happened?*

1. I further find that the 1st defendant could not have been at the Site when the Accident happened as now claimed by the plaintiff.
2. In this regard, I do not find the contents of the witness statement of Wong Kwok Wing Roger of the 2nd defendant helpful for 2 reasons. First, Wong was never called as a witness at the trial so his evidence had not been tested. Second and perhaps more importantly, in the answer to the interrogatories served on him, he admitted that the facts stated in his witness statement was based on hearsay and was not within his own knowledge. He obtained the information from Walter Lee, a former “Project Admin” who had in turn obtained those facts from the 1st defendant. His supplemental statement states that the information was incorrect “due to communication issues”. Thus, I would not place any weight on what Wong has stated in his witness statement.

1. In his evidence, the plaintiff first claimed that the 1st defendant came to the Site “after the lunch break” and asked him and his co-workers to take the “bags of cement, sand and mud to the upper area”. He also requested the 1st defendant to allow him to use the “truck mounted crane” to transport the construction material but he refused. The 1st defendant allegedly instructed him to use a wheelbarrow instead. What is significant is that in P’s WS, the plaintiff stated unequivocally that the 1st defendant had left the Site after giving those instructions to him.
2. Under cross-examination, the plaintiff tried to embellish his evidence by saying that the 1st defendant had not left the Site at all. The plaintiff claimed that the 1st defendant was sitting at his vehicle which was parked nearby. He insisted that the 1st defendant had asked him to take all the bags of cements, sand and mud “in one go”.
3. I do not accept the plaintiff’s allegation that the 1st defendant was present when the Accident happened due to the following reasons.
4. First, this is not what the plaintiff said in P’s WS (which was accompanied by a statement of truth). He stated clearly that the plaintiff had left the Site after giving him and his co-worker the instructions to transport the bags of materials.
5. Second, his allegation that the 1st defendant sat in his vehicle nearby after giving the instructions only came up for the first time during his cross-examination. I am sure that this is an afterthought which the plaintiff has made up in the witness box. If the 1st defendant was at the Site when the Accident happened, there is no reason why he had to chase the plaintiff to go back to work first on 8 October and in subsequent dates in October 2018 through his WhatsApp messages.
6. Third, if the 1st defendant was at the Site, he would have filled in and filed the Form 2 much earlier and would not wait until after the plaintiff had made a statement to the Labour Department on 15 November 2018.

*C.3.4. Was the truck mounted crane or motorized wheelbarrow required or suitable for use?*

1. The plaintiff also pointed out that in one of the photographs produced[[9]](#footnote-9), there was a truck with a mounted crane on the back parked by the side of the road “which could be used to transport the goods but the boss refused.” He stated that the driver of the truck is the brother of “Boss Chan”, ie the 1st defendant. I note that this allegation of using the “truck mounted crane” was first mentioned by the plaintiff in his witness statement[[10]](#footnote-10). However, no specific request was made by him to the 1st defendant to use a “motorized wheelbarrow” which the plaintiff claims in his witness statement “are commonly used at constructions sites especially at hilly areas as and areas where the workers are required to lift heavy objects at a distance.”[[11]](#footnote-11)
2. On this matter, I accept the 1st defendant’s evidence when he said that the plaintiff did not make a request for using the motorized wheelbarrow as there was none available at the Site. There was only a truck parked nearby with a mounted crane on top which belonged to his company. I also accept the 1st defendant’s evidence that no request was made by the plaintiff to use the truck mounted crane. I further accept the 1st defendant’s evidence and find that neither the crane nor a motorized wheelbarrow would be necessary or suitable for a simple task like the one the plaintiff was instructed by the 1st defendant to do. In this regard, I reject the plaintiff’s evidence that he had made such a request to the 1st defendant as I do not consider that the use of a motorized wheelbarrow was necessary in the circumstances nor was it “normal” in a small site like the one in question.

*C.3.5. Did the 1st defendant lend HK$500 to the plaintiff on the day of the Accident and why the plaintiff had been paid 13 days instead of 6 days?*

1. The plaintiff claims that he told the 1st defendant that he had been injured at work on that day and the 1st defendant gave him HK$500 to see the doctor. On the next day he informed the 1st defendant that he could not return to work. Hence the plaintiff claims that the subsequent voice mail messages by the 1st defendant were contrived by him.
2. There is no dispute that the 1st defendant gave HK$500 to the plaintiff on the day of the Accident. However, he said that it was money he lent to the plaintiff upon his request which was something he often did whenever the plaintiff asked. I accept the 1st defendant’s explanation that he knew he went to the doctor on that day but did not know it was in relation to a work injury. I think this explains why the subsequent voice messages from the 1st defendant kept chasing the plaintiff to return to work. I do not find those voice messages were manufactured as alleged by the plaintiff at all. I do not find the 1st defendant is that kind of employer who would think of such a devious scheme so soon after the occurrence of the Accident. In my view, this is highly improbable as all the contemporaneous documents do not lend support to such theory.
3. In this regard, I also accept the 1st defendant had, out of goodwill, paid the plaintiff 13 days of wages for the month of October eventhough the plaintiff had worked for 6 days only. This shows the 1st defendant was genuinely a caring employer who had been very generous to the plaintiff who was under his employment for over 7 years.

*C.3.6. Did the plaintiff work for the 1st defendant on 14 & 15 October?*

1. Besides working for the first 4 days in October, I accept the 1st defendant’s evidence that the plaintiff did return to work on 14 and 15 October for lighter duties. This is supported by the voice message on 13 October 2018 at 07:19 when the 1st defendant told the plaintiff that *“Bin, if you want to work, then go to Nam Long Shan Road to help with the traffic.”* Hence, I do not accept the plaintiff’s claim that he had returned to the site for the sole purpose of meeting the safety officer or representative from the 2nd defendant on those 2 days only. I find it highly improbable that the 1st defendant would pay him 2 days of wages for just returning to meet with the safety officer. As mentioned by the 1st defendant in his evidence, the 2nd defendant employed a safety consulting firm and on each and every occasion they would send a different safety officer to a site. Hence, he would not know who the safety officer was and therefore could not have arranged the plaintiff to meet the safety officer on those 2 days. I accept the 1st defendant’s evidence on this that the plaintiff did work on those 2 days in traffic light duties or moving guard rails. It seems to me this is inherently more probable.

*C.4 The 1st and 2nd Defendants’ liability*

1. In *Cathay Pacific Airways Ltd v Wong Sau Lai* [2006] 2 HKLRD 586, Bokhary PJ laid down the following principles:

“Of course, *the duty of care owed by employers to employees at common law is a single duty to take reasonable care for his employees’ safety*. This is so even though it is convenient to think of the duty as involving the provision of safe co-workers, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision and (where called for) adequate training. As Lord Keith put it in *Cavanagh v Ulster Weaving Co. Ltd* [1960] AC 145 at p.165, ‘[t]he ruling principle is that an employer is bound to take reasonable care for the safety of his [employees], and all other rules or formulas must be taken subject to this principle’.” [emphasis added]

1. In my view, there is little doubt that the 1st defendant as the direct employer of the plaintiff and the 2nd defendant as the principal contractor at the Site owed the plaintiff the above duties.
2. I agree with Mr Wright for the plaintiff that there was a serious risk of injury when the defendants allowed a worker to carry too heavy a load on the wheelbarrow. In my view, the 1st defendant could have given more specific instructions to the plaintiff on the day of the Accident when asking him to transport the bags to the upper area. He could have asked him specifically to divide the loads into 2 or 3 journeys but he had not done so. Further, the defendants could have devised a system of work where no more than certain weight should be transported by a single worker by using the wheelbarrow. However, that was not done. For those reasons, I find the 1st defendant and 2nd defendant partly liable for causing the Accident.

1. I note that this is something which the defendants do not dispute. As said, the focus in this case is on the degree of contributory negligence on the part of the plaintiff.

*C.5 Contributory negligence of the plaintiff*

1. On the issue of contributory negligence, Mr Law for the defendants in his closing submissions has cited the following cases.
2. In *Mohammad Waheed Khan v Rising Sun Transport Co Ltd*, unreported*,* HCPI 241/2010 (10 December 2012), the plaintiff injured his back when he carried two bags of rice (weighing over 50 kg) in one go. Mr Recorder Ambrose Ho SC held that the plaintiff should bear 30% of contributory negligence. At §34, he said

“… even though the Plaintiff was performing unskilled work, the risk of overloading oneself by carrying something weighing 50 kgs (with the attendant risk of injury) ought to have been apparent … In all the circumstances, I think the Plaintiff should bear 30% of the responsibility for his own injuries.”

1. In *So Chung Kwong v Ho Kuen & Anor* [2000] 3 HKLRD 241at 249 F-I,Deputy Judge Gill held that it is a fundamental principle and a matter of common sense that an employee undertaking activity in the course of his employment owes a duty of care to himself and will be liable to a reduction of any award if found in breach. In particular, the learned judge considered the following factors influential in assessing contributory negligence in an employment context:-
2. the level of skills and experience the employee has attained: the higher the level, the more he is liable to look after himself;
3. the degree of pressure imposed upon an employee by his employer to maintain or increase output at the expense of caution; obviously, the greater the pressure, the less the employee is to blame; and
4. the employee’s degree of familiarity with that activity puts his own safety at risk.
5. In that case, based on the particular facts of that case, the judge found contributory negligence at 30%.
6. In *Wong Yun Chiu v Union Printing Co Ltd*, HCPI 282 of 2009 (29 July 2011), in the context of an experienced worker attempting to lift a heavy basket of scrap paper over his shoulder, Bharwaney J stated the following:-

“2. ........On this occasion, he did lift a very heavy basket of waste scrap paper, weighing some 50 to 60 pounds, with a view to lift it over and above his shoulder and to tip it into the metal cage which was usually parked at the front of the factory in question to receive scrap paper. The top of the metal cage reached a height of just under 5 feet. As he was trying to tip the basket over the top of the metal cage, he lost his balance and fell on the factory floor.........

3. If this occasion was the one and only time he had done this, then I think this would have been a very simple case to decide, in that what he did, to engage in this exercise by himself without seeking assistance from others, or without using the forklift that was available for his use, was clearly foolish and foolhardy.

…

14. I also conclude that the substantial part of the blame must lie with the plaintiff for taking a short cut when he could have used the forklift, or sought assistance, as he had done on the past. He had 27 ‍years’ experience working in printing factories and 10 ‍years’ experience as a paper cutter. He acknowledged that he could have lightened the basket by transferring handfuls of scrap paper into the metal cage but that he did not do so as it would have reduced his work efficiency. He must have known that the act of lifting the heavy basket of scrap paper above his shoulders, in order to tip the basket over the top of the metal cage, might result in injury to himself and that the risk of injury was real. He failed to have reasonable regard to his own safety when he undertook that task on his own. Even if he thought that Mr ‍Siu was busy at work, he could still have asked Mr ‍Siu to help him to lift the basket. I have had regard to the authorities referred to me, but I do so acknowledging that, of course, each case is fact sensitive. In this case, I find that the degree of contributory negligence on the part of the plaintiff is 50 per cent. As I said above, what he did was foolish and foolhardy.”

1. In this case, Mr Law for the defendants asked the court to take into account of the following “important factors’ when considering the issue of contributory negligence on the part of the plaintiff. Those factors included:
2. a co-worker assisted the plaintiff in loading the wheelbarrow;
3. the cement, sand and mud bags were not tied together and could be separated and not in one piece;
4. the final load to carry on the wheelbarrow was within the discretion of the plaintiff;
5. the transport distance was only 10 metres or 10 odd steps slightly uphill (according to my findings);
6. use of wheelbarrow for load transport would be a common and familiar activity in construction sites;
7. the plaintiff could have done that by 2 trips without difficulty; and
8. it was common sense determination by an experienced worker like the plaintiff.
9. Based on those cited authorities and the factors listed out above, Mr Law submits that the contributory negligence on the part of the plaintiff should be in the range of 30 to 50% as decided in the above cases.

1. Mr Wright on the other hand submits that defendants allowed an unsafe practice happened “under their nose”; the plaintiff was merely doing what he was asked to do; and it was not so obvious to him of the danger to push weight of 110 to 120kg. Thus, he submits that the contributory negligence should be in the region of 10 to 20% at most only. However, no authorities have been cited to support his contention.
2. In my judgment, the plaintiff is clearly liable in contributory negligence in this case. Besides those factors listed out by Mr Law above (of which I accept), I also find that the plaintiff as an experienced general labourer (who had more than 7 years’ experience working for the 1st defendant or his associated companies and 10 years as a construction worker) could easily decide how he could transport the load to the upper area. It was a very simple task which did not require detailed or specific instructions from his employer or the main contractor. Similar to the findings made by Bharwaney J in *Wong Yun Chiu, supra*, I consider it was “foolish and foolhardy” for the plaintiff not to divide the load into 2 or even 3 journeys.
3. I further find that the plaintiff must have known the act of trying to balance a load of 110 to 120 kg on a wheelbarrow over the Plate with a lip / edge on its side might likely to result in injury to himself and that the risk of injury was real. In this regard, I find the plaintiff has failed to have reasonable regard to his own safety when he undertook the task of transporting the heavy load in one single journey, particularly when there was no pressure for him to complete the task within any time limit.
4. Balancing all the above factors, I find the degree of contributory negligence on the part of the plaintiff in this case at 40%.
5. *QUANTUM*

*D.1. General background and treatments*

1. The plaintiff was born in 1980 in Pakistan and received secondary education there. He settled in Hong Kong in 1996 and got married in 2008. He has 4 children, ranging from about 3 to 12 years old. He can speak and write some English and speak some Punti dialect. His mother tongue is Urdu.
2. Besides working as an office boy for 6 months, the plaintiff worked as a security guard and construction site general labourer. In addition, he was involved with his brother’s meat shop business and acted as its sole proprietor, with a net profit of $286,000 in 2013. He however claims that he was merely lending his name to his brother’s business and did not derive any income from it. The plaintiff is of large build, with a height of 173 cm and weighed 116 kg (255 lbs) in July 2019.
3. The plaintiff started working for the 1st defendant in or about 2011. Sometimes the plaintiff was led by the 1st defendant when the latter was engaged by other contractor(s), while the remaining of the time the plaintiff was employed by the 1st defendant as a direct employee. By 2018, the plaintiff was a very experienced worker with extensive experience working as a general labourer on different construction sites.
4. In the afternoon of the Accident, the plaintiff attended a private clinic known as Anson Care Medical Centre in Shaukeiwan and was examined by Dr Tuet on that occasion. In Dr Tuet’s very brief medical report, it has been recorded that physical examination revealed back muscle spasms and tenderness over the back muscle. The plaintiff was discharged with an injection and oral analgesics. 3 days of sick leave was given by Dr Tuet for the back injury.
5. The plaintiff then attended the Accident & Emergency Department (“A&E”) of Ruttonjee & Tang Shiu Kin Hospitals (“RTSKH”) on 8 October 2018, with sick leave given to him until 12 October 2018. He then attended the A&E of Pamela Youde Nethersole Eastern Hospital (“the Eastern Hospital”) on 12 October 2018 complained of low back pain. Clinical examination showed diffuse pain over the lumbar region. The diagnosis was “sprain back”. Sick leave was given to him up to 15 October 2018 on that occasion.

*D.2. Joint Medical Report (“JMR”)*

1. The plaintiff was jointly examined on 10 July 2019 by Dr Wong Chin Hong appointed by the plaintiff (“Dr Wong”) and Dr Lam Kwong Chin appointed by the defendants (“Dr Lam”).
2. In the JMR dated 5 August 2019, both experts agree that:
3. a joint physical examination showed that the plaintiff had *no paraspinal muscle spasm* and *no significant asymmetrical muscle wasting or spasticity*;
4. X-rays of the lumbar spine revealed *degenerative changes with mild marginal osteophytosis in his lower lumbar spine*. Features were compatible with mild lumbar spondylosis;
5. the plaintiff had mechanical low back pain, mainly over the right lower back. The pain was of *soft tissue or paraspinal muscle origin* and there was *no suggestion of bony damage or neurological involvement*; and
6. the plaintiff has *reached maximal medical improvement* and further conservative treatment would not change the present condition significantly.

[emphasis added]

1. The experts agree that back surgery is not indicated. They opine that the plaintiff has reached maximum medical improvement and was ready for assessment. They also agree he had mechanical low back pain, mostly over the right lower back, of soft tissue / paraspinal origin. The back condition was stable after rehabilitation and treatment was standard and appropriate. They agree the present back condition would have a mild adverse effect on his activities of daily living. Further conservative treatment would probably not change the current condition significantly.
2. Dr Lam is of the opinion that the plaintiff should be able to return to his pre-injury work as a construction site general labourer in a manner comparable with others of his age and in general physical health.
3. However, Dr Wong opines that the symptoms and signs of soft tissue injury will improve in time but will not resolve completely. He is of the view that the plaintiff will need to modify his work routine if he wishes to return to work at the construction site by avoiding repeated exertion / lifting heavy objects (e.g. more than 20 kgs) and allowing frequent rest (e.g. at 30-minute intervals).

*D.2.1. Sick Leave*

1. Dr Wong considers that all sick leaves granted to the plaintiff (about 12 months) while being treated and followed up are reasonable and acceptable. Dr Lam disagrees and opines that the sick leaves were unduly prolonged and unnecessary. Judging from the nature of back pain nature, expected progress and work requirements, Dr Lam is of the opinion that sick leave of up to 6 months should be the maximum.
2. In *Li Cheuk Lam v Cheung Sun Tai & Other,* HCPI 1102/2015 (Master Leong;13 October 2017), the plaintiff was a self-employed container truck driver aged 45 at the time of the accident. Due to a traffic accident on 16 August 2013, he injured his right knee but could walk out of his truck by himself. He was sent to A&E of Tuen Mun Hospital by ambulance. The A&E recorded on physical examination as: “Right knee -mild swelling -effusion -tenderness over the medial joint line -decreased extension/flexion because of pain”. X-ray of the right knee showed no fracture or dislocation. The plaintiff was given painkiller medicine and discharged home with 4 days of sick leave. However, the plaintiff attended medical treatments for 10 times.
3. Master Leong made the following comments about his sick leave in the judgment[[12]](#footnote-12):-

“If a patient chooses to passively take the same medications (despite the obvious failure of such medications to cure the persistent pain) and sit out until the last day of every sick leave period, *this rather suggests that the patient is more concerned in obtaining continuous sick leaves than about curing any alleged complaints.”* [emphasis added]

1. Another more extreme case has been decided by the same learned judge in *Subba Alvin* *also known as* *Gurung Yadap Chandra v Houng Kee (Asia) Limited & Others,*HCPI 154/2010 (Master Leong; 16 July 2014). The most alarming aspect of that case was the plaintiff’s continual attendance at the Yau Ma Tei Jockey Club General Out Patient Clinic on some 120 occasions over 1.5 years. His complaints were “*neck pain radiating up to both side of the head and triggers headache that makes the Plaintiff very hard to bear; pain in neck very deep and constant and…aggravated by neck movement; unable to fall asleep”,* etc.. Those unusually prolonged sick leave was rejected by the court.
2. In that case, it appeared that the plaintiff was not serious about treating his injury when consulting the doctors in the public hospitals or clinics. It appeared also that he was more interested in obtaining his sick leaves rather than in finding a cure to his underlying problems. The plaintiff was given a few days of sick leave after each attendance. He would then return regularly, as clockwork, whenever the sick leave period ran out. In fact, throughout that period, the plaintiff’s behaviour showed that he did everything to ensure that he obtained a continuous period of sick leave but did nothing (or next to nothing) to obtain cure for a serious illness that one would expect a reasonable person would do. Therefore, the court found that the plaintiff in that case was far more interested in obtaining sick leaves than to find a cure to his alleged illness.
3. In our present case, the plaintiff attended medical treatment/consultation on an incredible 34 occasions over 10 months (from 4 October 2018 to 14 August 2019). 22 of those occasions were to Leung Kau Kui Clinic (“LKKC”) in Tokwawan near to where he lives. Each time he was given 2 to 3 days of sick leave only, indicating that his condition could not have been that serious at all. In total, the plaintiff was given about 12 months of sick leave until 25 September 2019. Save for 2 occasions, the plaintiff always returned for consultation on the last day of the sick leave period or the next day upon the expiry of the sick leave. In the consultation note dated 16 October 2018 at LKKC[[13]](#footnote-13), it has been recorded that it was the plaintiff who had requested the sick leave. The same remark has been repeated in every subsequent LKKC consultation notes. In my judgment, this strongly suggests that the plaintiff was keen to return for the consultation at the LKKC for the main aim to extend his sick leave only rather than to find a cure to his back condition.
4. As Mr Law has submitted, it is well known that no medical instruments can measure or confirm the degree or severity of back pain. They are usually subjective complaints which cannot be easily verified by objective means. However, in our present case, both experts agree that there was no fracture, bony damage, or neurological involvement of the back. There was also no paraspinal muscle spasm and no significant asymmetrical muscle wasting or spasticity. When the plaintiff was seen at YMT GOPC on 16 October 2018 (which was just 12 days after the Accident), physical examination showed that his straight sitting leg and lower limb power were normal and he could also walk with a normal gait. Both experts agree that the pain was of soft tissue or paraspinal muscle origin. In other words, it was a minor soft tissue or muscle injury only.
5. In my view, the above objective indicators like muscle wastage, muscle spasm, fracture or bony damage listed out by the experts would show a person is suffering from severe and genuine back pain or not. However, the plaintiff has displayed none of those signs despite of his prolonged complaints of serious back pain.
6. When the plaintiff was advised to undergo an MRI scan on 28 December 2018 at the consultation in LKKC, he did not make such a booking. His excuse was the waiting list was too long. During cross-examination, he said the hospital staff told him that a waiting period of 5 years was needed, while in the witness statement he stated the waiting time was 1 year only. Whether the waiting time was 5 years or 1 year, I find the reality is that the plaintiff was not keen to have an MRI scan done at all. He could easily have it done in the public sector without any charge (as he and his family is on public welfare assistance since the Accident). Or alternatively he could have it done in the private sector at a cost of around HK$5,000 without waiting at all. The fact is that the plaintiff after receiving his employees’ compensation, he would have more than sufficient money to pay for the MRI scan in the private sector had he choose to do so. In my view, the MRI scan would certainly help the doctors to identify the real cause of his back pain. The fact that he was reluctant to do so strongly suggests to me that he was far more interested in obtaining sick leaves than to find a cure to his alleged severe back pain. I agree with Mr Law that this should cast doubt on his subjective complaints and credibility and his subjective performance in the occupational therapy tests.

*D.3. Surveillance videos and reports*

1. The plaintiff was placed under observation and surveillance by the private investigators engaged by the defendants’ insurers for a total of 9 days over different periods in 2019 and 2020.

1. The plaintiff was not caught working at any construction sites or carrying out any heavy duties in any of those videos. However, he was seen walking with a normal gait and at normal pace. His body mobility appeared to be perfectly normal and natural. On one occasion, he was seen bending down and picked up his young daughter from the pavement. On another occasion he was seen bending down to pick up his young son from the ground level. He was also seen buying groceries and drinks items and carried them with ease. He was seen able to carry out normal bodily motions and had no difficulty in executing various postures with his body. He did not display any sign of back pain or trouble at all.

*D.4. Pre-existing condition*

1. In the JMR, both experts agree that the degenerative changes with mild marginal osteophytes in the lower lumbar spine shown in the x-ray were pre-existing.
2. As the plaintiff had no previous history and back injury/problem, Dr Wong opines that the plaintiff’s persistent low back symptoms and signs were triggered and were fully (100%) attributable to the Accident. Dr Wong further opines that they were mild and could have remained asymptomatic for many years. No history indicates a strong possibility that some other event would have brought about the plaintiff’s present state. In Dr Wong’s opinion, at the age of 39, the natural progression of the plaintiff’s pre-existing condition would not have brought his current state but for the Accident.
3. In §69 of the JMR, Dr Lam states that, “…..assuming that the alleged incidence has precipitated back pain in a mildly degenerated spine, the alleged incident would contribute for apportionment purpose to half of the present disability”.
4. In *Chu Chung Wah v Ng Tung Pak & Anor*, HCPI 547/2003 (Master Jeffries; 15 December 2004), the court stated at §§ 17 & 21 of the judgment that:

“17. Nevertheless, whilst the principles of *Chan Kam Hoi* are accepted, there is an important distinction of fact, since in this case it is neither suggested that the pre-existing condition was severe, nor was there clear evidence that it would have led the Plaintiff to give up work in any event at some future time.  That is relevant to how much discount to give.  The only evidence on this point was a comment by Dr. Chan, in response to Defendants’ solicitors’ questions, that the pre-existing condition ‘could have flared up in the next 1 or 2 years’.  I regard this as something of a throw away line, which says nothing about the real prospects, or what effect this might have had on the Plaintiff’s working life.  Nevertheless, the Plaintiff accepts a reduced multiplier, and did not controvert Dr. Chan’s comment.  It seems to me there is some risk that the pre-existing condition may have had some uncertain future impact on the Plaintiff’s working life.  This falls far short of the prognosis in *Chan Kam Hoi.*

*…*

21. Having considered the facts and the authorities, I would have accepted an assessment of PSLA in this case at HK$200,000, but some reduction should be made for the admitted pre-existing condition.  The matter is not capable of precise definition, or calculation, but a reduction of 20% or HK$40,000 seems appropriate.  I therefore award HK$160,000 for pain suffering and loss of amenities.”

1. Mr Law submits that a 20% discount should be made by relying on Dr Lam’s opinion while Mr Wright submits that no deduction should be made for any pre-existing condition.
2. Given the fact that the plaintiff had no previous history or back pain and he was able to work full-time for the 1st defendant on different construction sites as a general labourer for more than 7 years prior to the Accident without any problem at all, I am of the opinion that the minor low back pain was 100% attributable to the Accident. I agree with Dr Wong that it is likely that the plaintiff could have been able to continue working as a construction site worker until his normal retirement age at around 60 had it not been for the Accident. I therefore am of the view that no deduction should be made for any pre-existing condition.

*D.5. Pain, suffering, and loss of amenities (PSLA)*

1. Mr Wright for the plaintiff submits that the injuries of the plaintiff fall below the low end of the serious injury category and a sum of HK$200,000 has been suggested as the award for PSLA. He relies on the sole case of *Yuen Chun Sun v On Ascent Ltd,* HCPI 303/2012 (Deputy High Court Judge Hartmann J (as he then was); 11 October 2013) as his authority. No other cases have been cited in support of his claim for PSLA either in his opening or closing submissions.
2. Mr Law for the defendants on the other hand submits that generally speaking, the courts had awarded PSLA of HK$80,000 to HK$100,000 for genuine soft tissue back contusion without pathological damage or neurological deficit. In some of the more serious back injury cases involving prolapse or fracture to the lumbar spine leaving mild to moderate residual pain and disabilities, an award of about HK$150,000 would be given.
3. Mr Law submits that a sum of HK$80,000 should be awarded for PSLA only. He relies on the following cases in support of his contention:-
4. In *Yip Piu v Chung Kam Fei,* HCPI 1168/1999 (Cheung J (as he then was); 27 November 2000), the court awarded HK$100,000 as PSLA to a “26-year-old young man who had exaggerated his complaint” for minor head injuries and dorsal back pain.
5. In *Wong Chiu Wa v Ng Yuk Chun*, HCPI 258/1999 (Master de Souza; 16 November 2001), the court awarded HK$30,000 as PSLA to the claimant, whom the court found was a malingerer in a claim following a “very trivial accident.” The claimant had exaggerated her minor buttock and back soft tissue contusion injury;
6. In *Chu Siu Iong（朱小容） v Cheung Ho Yin（張浩然）*, DCPI 580/2011 (His Honour Judge Kent Yee (as he then was); 7 May 2013), the claimant was found to have sustained a contusion injury of the back when she fell at work. No bony or neurological damage was found. The claimant also complained of psychiatric conditions/suicidal ideas and incomplete emptying/post-void urinary incontinence. Before the Court, no medical evidence was adduced to prove the causal link between the accident and the alleged urological and psychiatric problems. The Court found the claimant to be a witness prone to exaggeration and found no causative relationship between the accident and the psychological/urological issues of the claimant. The Court awarded the claimant $100,000 as PSLA.
7. In *Chan Lung Hing v Ng Kam Man,* HCPI 405/2012 (Master K Lo; 20 June 2014), the injuries suffered by the plaintiff was soft tissue injury to the neck and back. Despite the plaintiff’s subjective complaints about flexion and bilateral rotation pain, the same was not supported by any objective signs. Though said to Dr Wong, the neck pain complained of is consistent with persistent soft tissue inflammation of the corresponding area. According to Dr Chun, there is no evidence of neck inflammation. … The prognosis of the neck and back of the plaintiff is good. The experts say that he is expected to have reduced tolerance for heavy lifting and carrying. The court preferred the view by Dr Chun that the plaintiff could return to his pre-accident job as a car mechanic for heavy vehicles with mild discomfort. The court said that no doubt the plaintiff’s conditions are much better than what he said.  The plaintiff is independent in his activities of daily living. The court held that the appropriate award under PSLA was $120,000.
8. In *So Loy Hing v The Kowloon Motor Bus Company (1933) Limited*, HCPI 910 /2011 (Master A Ho; 8 August 2014), the court awarded a sum of $130,000 as PSLA for lower back contusion injury.  The claimant complained of urinary incontinence for the first time some 18 months after the accident but claimed that he had the problem three months later.  The court did not accept that the claimant had urinary incontinence and found that it had nothing to do with the accident, even if the claimant did have urinary incontinence.
9. In *Lau Wa Ying (A Bankrupt) v Caritas-Hong Kong,* DCPI 2885/2014, (Deputy District Judge KC Chan (as he then was); 6 March 2017), the plaintiff had a slip and fall accident on 6 August 2013. On the next day, she attended Princess Margaret Hospital (“PMH”), and a physical examination showed mild tenderness over her lower back and the sole of her left foot. X-ray showed no bone fracture. No neurological sign was noted. She was discharged with medication. 2 days’ sick leave was given. After that, she complained of continuous ache from the left side of her lower back radiating to the left sole. She consulted various institutions and private doctors, including Chinese medicine practitioners, government clinics, physiotherapy sessions, and psychiatric treatment till December 2015. She would seek consultation whenever the sick leave period expired and repeatedly give sick leave certificates. The Court considered the injuries and loss suffered by the plaintiff and considered the psychiatric disorder a single episode of mild to moderate severity sustained by the plaintiff; the Court would have awarded $120,000 for PSLA. The claim of the plaintiff was dismissed.
10. In my judgment, there is certainly an element of exaggeration of symptoms and prolonged sickness on the part of the plaintiff in this case. While I do not subscribe to the defendants’ expert Dr Lam’s view that the plaintiff might not have an actual back injury at work on the day of the Accident, it is clear from the objective medical indicators that whatever injuries he had sustained on that day was a soft tissue injury which was relatively minor and insignificant. In my opinion, it certainly would not require any prolonged sick leave for more than say a few weeks or couple of months. The fact that it was the plaintiff who had been “requesting” for those sick leave from the doctors at LKKC on almost every single occasion in his repeated consultations after a few days of sick leave strongly indicate that those sick leave was not necessary and not warranted.
11. Further, the total impairment of 1% and loss of earning capacity of 1% given by Dr Lam or the total impairment of 3% and loss of earning capacity at 3% given by Dr Wong further demonstrate that the injuries suffered by the plaintiff, if any, were minor and insignificant.
12. In addition, the surveillance videos & reports produced by the defendants show that the plaintiff was seen walking with a normal gait and pace. His body mobility appeared to be normal and natural. The video footages show the consistency of the plaintiff’s normal bodily motion and he had no difficulty executing various postures with his body.
13. In the aforesaid circumstances, I consider that an appropriate PSLA award in this case should be in the sum of HK$80,000 only.

*D.6. Earnings of the Plaintiff*

1. It is common ground the plaintiff’s wage was at $950 per day and the average monthly salary was agreed by the parties at HK$24,000.
2. From the Bank of China (“BOC”) passbook entries of the plaintiff, it can be seen that the plaintiff first received HK$17,592 on 27 November 2018 (which was about 7 weeks after the Accident) from the Social Welfare Department. The plaintiff admitted that this sum came from the Comprehensive Social Security Assistance (“CSSA”) Scheme. The passbook entries show that the monthly CSSA payment continued and gradually increased to over HK$20,000 from January 2020 onwards. From November 2018 to July 2020, the plaintiff received in total a sum of about HK$400,000 from the CSSA Scheme and such monthly payments continued to date. Obviously, CSSA payments should be regarded as benevolent / welfare payments and any deduction is unnecessary.
3. However, in my judgment, this does help to explain why, despite the relatively minor injuries found by the experts, the plaintiff has not returned to his pre-accident job as a general labourer at construction sites and has only worked as a part-time guard / caretaker in a resident building, working at most a few days per month only. In my view, there is simply no incentive for the plaintiff to engage in any full-time gainful employment. Otherwise, the CSSA payments may stop completely. Further, there have been no wage documents for his part-time jobs in the past years. Despite repeated requests from the defendant, the plaintiff’s solicitors replied that all such companies refused to provide any documents and one company even immediately fired the plaintiff. This is something I find hard to believe.
4. As stated in the defendants’ opening, the plaintiff is under a duty to mitigate his loss. Just to say that he could only work as a guard and willing to deduct the “would be earnings” of that of a full-time property management guard / caretaker from that of a full-time construction site worker in my view is not good enough. The plaintiff must demonstrate the real efforts and steps he has taken to return to his pre-accident employment. In my view, the plaintiff has failed to do so in this case.
5. In this regard, I agree with Dr Lam’s opinion that most workers with similar back pain (disregarding the causation) but no substantial structural damage / neurological deficit could return to work, even strenuous ones. I further agree with Dr Lam that, based on the more objective parts of the findings, the plaintiff should be able to continue with his pre-injury work as a construction site general labourer, and work as such in a manner comparable with others of his age and general physical health. I agree with Dr Lam that the plaintiff might have some residual back symptoms upon prolonged working or exertion, but the overall adverse effect upon discharging of his duties should be mild. I agree that the main strain on his back comes from his own body weight as he is rather obese.
6. On this matter, I do not accept Dr Wong’s opinion at all that he needs to modify his work routine and to avoid repeated exertion / lifting of heavy object and allow frequent rest which the plaintiff claims makes him not “employable” on construction sites as no employer would employ him. As said, I do not consider that the plaintiff has been completely frank about his injuries and the effects they have on his ability to work. I do not think the objective signs support the claim that he would not be able to return to gainful employment as a general labourer for the rest of his working life.

*D.7. Pre-trial loss of earnings and MPF benefits*

1. In my judgment, the plaintiff should have been able to return to work on construction sites no more than a few months after the Accident. This in my view is well borne out by his treatment records.
2. As mentioned, for the first few months after the Accident, the plaintiff repeatedly attended LKKC, each time requesting further sick leave to be given to him. And on each occasion, the doctors were only willing to extend the sick leave for 2 to 3 days only. The plaintiff’s last attendance at LKKC was on 2 January 2019, about 3 months after the Accident.
3. Thereafter, the plaintiff, despite entitled to free medical service at the public sector, decided to consult a doctor at a private clinic known as the ‘Wellness Clinic and Pain Centre’ in Tsim Sha Tsui on 2 separate occasions (on 8 January 2019 and 4 February 2019) where he was granted sick leave for one month on each occasion. After that, the plaintiff, despite living in the Tokwawan area in Kowloon, decided to seek further consultations at the Eastern Hospital in Chai Wan where he obtained further sick leave for another 6 months.
4. In my view, it is rather obvious that the plaintiff tried to request for extended and prolonged sick leave right from the beginning at the LKKC when they were no longer necessary. When the doctors refused to extend those sick leave to him, he then changed his tactics and went to the private clinic first where he managed to obtain a further 2 months of sick leave (one month on each occasion). Thereafter, he went to a different public hospital to extend his sick leave for another 6 months. In my judgment, those prolonged sick leaves were totally unnecessary and unwarranted in light of the rather minor back injuries sustained by him in the Accident.
5. I further find that the plaintiff has failed to mitigate his loss by failing to obtain a MRI scan (whether in the public or private sector) so as to allow the doctor to determine the true cause of his alleged persistent back pain. He has also failed to mitigate his loss by not trying to find a job on construction sites as a general labourer once he knew the doctors at LKKC refused to extend his sick leave.
6. I consider Dr Lam’s opinion of a maximum of 6 months’ sick leave is on the generous side. In my view, the plaintiff should be able to return to work as a general labourer at construction sites no more than 4 months after the Accident when the sick leave at LKKC ended. However, to give the benefit of the doubt to the plaintiff, I would allow an extra 2 months for him to find a job and return to his pre-accident employment, thus allowing a total pre-trial loss of earnings of 6 months.
7. Hence, the pre-trial loss of earnings which I would allow in this case would be as follows:-

HK$24,000 x 6 months x 1.05 MPF = HK$151,200.

*D.8. Future loss of earnings and MPF benefits*

1. The plaintiff claims that he cannot return to his pre-accident job and can only perform duties which will pay a lower wage. He claims that he is now 42 years old and probably would have been able to work as a general labourer until 60 years old. At which time he would have had to take up lighter, lower paid work similar to that he can earn now. The plaintiff’s counsel submits that an appropriate multiplier should be about 14 years or about 168 months. Based on the difference of the income between a construction site worker and a guard in a residential building (which have been agreed by the parties at HK$14,500 per month), the plaintiff claims a total post-trial / future loss of earnings at HK$1,764,000 (HK$10,000 x 168 months x 1.05).
2. Based on my analysis of the medical evidence and the findings I made above, I do not consider the plaintiff is entitled to a claim for loss of future earnings in this case at all.
3. I therefore will not allow any award under this head.

*D.9. Loss of earning capacity*

1. The well-established legal principles are laid down in the Court of Appeal decision of *Yu Kok Wing v Lee Tim Loi* [2001] 2 HKLRD 306, citing the famous case of *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132:-

“It is important to remember what an award for loss of future earning capacity is actually for. As was said by Lord Fraser of Tullybelton in the Privy Council in *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176 at 183B-D, it is intended… to cover the risk that, at some future date during the claimant’s working life, *he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market.* The Court has to evaluate the present value of that future risk — see *Moeliker v A. Reyrolle & Co. Limited* [1977] 1 WLR 132, 140, where Browne L.J. dealt fully with this matter...” [emphasis added]

1. Mr Wright, the plaintiff’s counsel, submits that the plaintiff is a man of 42 with basic education and no formal skills or qualifications. His language skills are limited, and being of Pakistani origin normally means his future employment choices and prospects are limited. Therefore, it is unlikely that he will able to find permanent and secure work. Therefore, the disability may disadvantage him in the open labour market, competing with the more able applicants for a security guard position. The plaintiff claims that the experts appear to agree that he has a mild residual disability.
2. However, balancing that, I think one must take into consideration the fact that the joint physical examination shows that the plaintiff has no paraspinal muscle spasm and no significant asymmetrical muscle wasting or spasticity. Further, Dr Lam is of the opinion that the plaintiff’s pain could usually improve upon conservative treatment within a short time. I agree with Dr Lam that the chronicity and intensity of the plaintiff’s back complaint were out of proportion, vague and subjective. Upon examination, the physical signs were entirely based on voluntary effort. There were minimal objective signs to support the plaintiff’s claims.
3. Further, taking into account of the plaintiff’s hesitation in taking an MRI scan by using different excuses, I find either the plaintiff’s primary objective is not to cure his sickness or his injury has already been fully recovered. After watching the video footage, I entirely agree with both experts that the plaintiff’s present back condition would have a mild adverse effect on his activities of daily living. I further agree with Dr Lam that he could go back to his previous work as a general labourer although with “some residual back symptoms upon prolonged working or exertion, but the overall adverse effect upon discharging of his duties should be mild”.
4. Taking the matter in the round, I do not consider the risk of losing his job as a construction site worker due to his mild back pain of soft tissue / paraspinal muscle origin is high at all. I think by allowing 3 months’ income will be more than adequate to cover such loss / handicap in the open labour market.
5. Hence, I will make an award HK$72,000 (HK$24,000 x 3) as loss of earning capacity in this case.

*D.10. Special damages*

1. The plaintiff claims 2 items of expenses under this head. One is of HK$5,000 for medical expenses and the other items is HK$1,000 for travelling expenses.
2. For the medical expenses claimed at HK$5,000, save from a sum of HK$160, the plaintiff has failed to provide any receipts, including his 2 consultations with Wellness Clinic and Pain Centre in the private sector. For the treatments at the government hospitals and clinics, since the plaintiff has been a recipient of CSSA benefits since November 2018, he is exempted from paying any medical fees at the Hospital Authority. Thus, in my view, the total medical expenses could not be more than HK$800.
3. As for the travelling expenses claimed at HK$1,000, the LKKC where he attended most of the medical consultations is within walking distance from the plaintiff’s residence, thus no travelling expenses would be involved. The other few occasions were to Wellness Clinic and Pain Centre in Tsim Sha Tsui and the Eastern Hospital in Cha Wan where the plaintiff could take public transport like MTR or buses. I estimate that the travelling expenses involved will be no more than $200.
4. Thus, the total special damages I would allow in this case would be at HK$1,000 only.

*D.12. EC payment*

1. The plaintiff accepts that he had received a sum of HK$300,000 from the defendants as settlement of the related EC claim in DCEC 531/2019. The plaintiff is willing to give credit for this amount.

*D.11. Summary of Damages*

1. Based on the findings above, I will allow the following sum as damages in this case:-

|  |  |
| --- | --- |
| 1. PSLA | HK$80,000 |
| 1. Pre-trial loss of earnings & MPF benefits | HK$151,200 |
| 1. Future loss of earnings & MPF benefits | Nil |
| 1. Loss of earning capacity | HK$72,000 |
| 1. Special damages | HK$1,000 |
| Sub-total | HK$304,200 |
| 1. Less: contributory negligence at 40% | (HK$121,680) |
| 1. Less: employees’ compensation | (HK$300,000) |
| Total | (HK$117,480) |

1. *CONCLUSION*
2. In conclusion, based on my findings that the plaintiff should be made 40% liable for the Accident in contributory negligence and my calculations for the damages above, after deduction of the employees’ compensation received, the plaintiff will not be able to recover anything from the present proceedings. Hence, the plaintiff’s claim will be dismissed. I so make such an order.

*E.1. Interest*

1. Had the plaintiff been able to recover any damages, I would have awarded interest in this case. Interest will be awarded at 2% for general damages for PSLA from the date of the writ until judgment and for special damages at half of the judgment rate from the date of the accident to the date of judgment.

*E.2. Costs*

1. Costs will follow the event. Although technically the plaintiff has succeeded in his claim on liability (subject to the deduction of contributory negligence at 40%), he in fact will not recover any damages in the present proceedings after deducting the employees’ compensation received. Thus, the whole exercise was futile and the common law claim / trial proved to be a complete waste of time and money. The evidence shows that he had been more than adequately compensated for by way of the employees’ compensation of HK$300,000 paid to him by the defendants. In other words, the plaintiff is really the losing party in this case.
2. I therefore will make an order *nisi* that the plaintiff do pay the defendants costs of the action, such costs to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. In the absence of any application from the parties to vary the same within 14 days from the date of handing down of the judgment, the costs order *nisi* will become absolute.

( Andrew SY Li )

District Judge

Mr John Wright, instructed by Messrs John M. Pickavant & Co., for the plaintiff, assigned by the Director of Legal Aid

Mr Dennis Law, instructed by Messrs John Lam, Law & Co., for the 1st and 2nd defendants

1. See Photos BY2 to BY6 on [A-1/147 to 155] [↑](#footnote-ref-1)
2. [A-1/191] English translation at [A-1/203] [↑](#footnote-ref-2)
3. [A-1/155] [↑](#footnote-ref-3)
4. §18 of the 1st defendant’s witness statement (“D1’s WS”) at [[A-1/184] [↑](#footnote-ref-4)
5. See P’s Supp WS [A-1/161] at §3. [↑](#footnote-ref-5)
6. See [A-2/296-298] [↑](#footnote-ref-6)
7. See [A-2/299] [↑](#footnote-ref-7)
8. See [A-2/302] [↑](#footnote-ref-8)
9. [A-1/147] [↑](#footnote-ref-9)
10. §14 of P’s WS at [A-1/133] [↑](#footnote-ref-10)
11. §17 of P’s WS at [A-1/135] [↑](#footnote-ref-11)
12. See §14 of the Judgment [↑](#footnote-ref-12)
13. [B/727] [↑](#footnote-ref-13)